OGC 74-2206

26 November 1974

MEMORANDUM FOR: Deputy Director for Administration

SUBJECT : New Amendments to the Freedom of Information Act

1. Congressional action completed on 21 November 1974 to override the President's veto of the Freedom of Information Act Amendments means that the amendments have been enacted and, under the terms of the bill, become effective in 90 days (20 February 1975). Various Agency actions to comply will be necessary or desirable. To assist in Agency consideration of steps to be taken, this analyzes the main features of the bill.

2. The Freedom of Information Act is codified in the United States Code as Section 552 of Title 5. The current exemptions in Section 552 are listed in subsection (b) thereof. All the new amendments are amendments to Section 552.

3. Our comments follow:

(a) The exemption from the requirement for disclosure of national security information is revised. The current exemption is for matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." As modified, it is for matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." Clause (A) of the new language is probably an improvement--Executive Order 11652 does prescribe "criteria," or definitions, of information which must be classified. It does not specifically require that any "matters" be kept secret. Clause (B), with other provisions of the new law, is designed to negate the Mink decision which held that the courts may not examine the correctness or reasonableness of Executive branch classification decisions.

Will there be a new E.O.?

(b) The extent of judicial review is broadened also by new language which authorizes the court to "examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth" in the Freedom of Information Act. There is some legislative history of this amendment which expresses the intent or confidence of the Committee that the courts will give due weight to the views of the agency involved--and indeed accepted rules of statutory construction require that the views and practice of an agency charged with administering a statute are to be accorded special consideration. Notwithstanding the legislative history, the new law authorizes the courts to determine the correctness of an agency's classification decision. This means that the government will need to prove to the satisfaction of the judge the national security implications of the information at issue. While it may be that this provision is unconstitutional as a legislative usurpation of the President's authority in foreign relations and defense, until that question is settled by the courts we are faced with all the problems which arise when and if we are in court under the Act, in particular, the problem of continuing to protect information while also proving its significance to national security.

(c) Each agency is to promulgate regulations "pursuant to notice and receipt of public comment" specifying a fee schedule for charges for services performed under the Act. But fees are limited to "reasonable standard charges for document search and duplication." Although there is some legislative history which would indicate that "search" costs are intended to include "review costs," this does not appear to be the case and we will not be able to charge a requester for the study and review by which we make our decisions to continue the classification of the document or to declassify it. The request that fee schedules be established after "notice and receipt of public comment" means that we will have to publish the final schedule when the new law becomes effective.

(d) The bill establishes extremely tight deadlines for agency action on requests for documents. A request must be acted upon within 10 working days of receipt of the request. Upon appeal to the appeal echelon of the agency, the appeal must be acted on within 20 workdays. (There are provisions under which in special circumstances an agency may extend either of these deadlines, but apparently

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not both, by not more than 10 days. The circumstances which permit this extension in many cases will not be helpful to CIA action on requests.) When an agency fails to meet the deadlines, the requester may institute suit. The court may proceed to try the case or if "the government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request" the court may allow the agency additional time to complete its review. At that stage an agency will have to be able to show due diligence and will have to comply with orders of the court. Manifestly the Agency cannot meet these deadlines in virtually all cases. Probably we will have to couch our denial letters in terms indicating our diligence and our willingness to complete our review.

(e) The "names and titles or positions of each person responsible for the denial of" a request are to be furnished the requester. Also, in an annual report to Congress the agency head is to report "the names and titles of positions of each person responsible for the denial of records requested under" the Act "and the number of instances of participation for each." Notwithstanding the use of the plural in specifying the individuals whose names and titles must be furnished, only one person in fact is responsible for a decision (except denials by committee vote) and only one would have to be identified for each denial. But the original denier and the official who denies on appeal would have to be named. This suggests that we will have to arrange our administrative procedures so that the final decision (or the decision to grant) is made by an employee whose CIA employment is not itself classified information. In this regard, the Act apparently intends and does negate the provisions of section 6 of the CIA Act which exempt the Agency from any provisions of law which require the disclosure of information concerning the organization and personnel (including names and titles) of the Agency.

(f) In ordering an agency to furnish to a requester documents withheld by that agency, the court also may issue "a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding." In the event of such a written finding by the court, "the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for

the withholding" (emphasis supplied). The Commission after investigation is to submit its findings and recommendations to the administrative authority of the agency concerned, which shall "take the corrective action that the Commission recommends." In addition, the agency head must include in his annual report to Congress an account of "the results of each proceeding" by the Commission, "including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken." In view of the serious implications of this feature of the law, Agency personnel involved in reviewing documents for declassification may want to consult with the General Counsel before making a final decision to deny. It should be noted also, on the other hand, that it is the "corrective action" recommended by the Commission that the agency must take. The Commission's recommendation could, and undoubtedly will, be directed primarily to the modification of procedures, reassignment of personnel, etc., and only rarely will require disciplinary action. Further, the Commission undoubtedly will work with the agencies and seek their advice and recommendations, etc. In some cases, the Commission may forward tentative conclusions and recommendations and request agency comment. Nevertheless, this is a serious problem and consultation with the Commission concerning this entire area would be in order at an early date.

(g) By way of emphasizing our need to deny a requested document only when we properly may do so, the court may assess against the United States "reasonable attorney fees and other litigation costs reasonably incurred" by the requester in those cases in which the requester "has substantially prevailed." It is our understanding these costs would be borne by the agency involved rather than by the Department of Justice or the United States Attorney's Office.

(h) The new law adds to the current provisions for exemptions the requirement that: "Any reasonably segregable portions of a record shall be provided to any person requesting such record after deletion of the portions which are exempt."

(i) The requirement that the requested records be sufficiently identified by the requester has been modified to assist the requester.

In particular, the amendment takes into account the fact that in many cases the requester cannot know with accuracy what documents exist. The old language "request for identifiable records" is replaced by the words "request for records which. . .reasonably describes such records." This seems certain to increase the burdens on the agencies. On the other hand, the new law continues the requirement that the request must be made in accordance with published rules stating "the procedures to be followed." It may become necessary to protect ourselves against excessive, unreasonable, or harassment requests by requiring strict compliance with "the procedures to be followed" in submitting requests.

4. I think this law is extreme. If cause-oriented groups want to test CIA compliance or if anyone wants to harass the CIA, there may well be a serious question of our ability to perform our mission.

5. These amendments require revision of the Agency regulation. We are preparing a revision which will also accomplish other needed changes.

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